

United Rubber, Cork, Linoleum and Plastic Workers of America, Local 878 (Goodyear Tire & Rubber Company) and Edward A. Marvin. Case 26-CB-1569

March 25, 1981

DECISION AND ORDER

On October 8, 1980, Administrative Law Judge John M. Dyer issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge but not to adopt his recommended Order.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, United Rubber, Cork, Linoleum and Plastic Workers of America, Local 878, Union City, Tennessee, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Preventing nonunion unit employees from receiving grievance pay.

(b) Informing employees that it has prevented nonunion unit employees from receiving grievance pay.

¹ Respondent excepts to the Administrative Law Judge's reliance on, and acceptance of, what is in its view hearsay testimony in finding that Respondent violated Sec. 8(b)(1)(A) and (2) of the Act. We find no merit in this exception.

The Board has decided that it is not bound to apply strictly the Federal Rules of Evidence concerning hearsay. *Alvin J. Bart and Co., Inc.*, 236 NLRB 242 (1978). In any event, the statements involved herein fall within the definition of an admission by a party opponent, and therefore are not hearsay. Fed. R. Evid. Rule 801(d)(2). Specifically, Jerry Lee Pierce, who was at the critical time in question a nonunit maintenance clerk, testified that he found the error in omitting Marvin from the Union's grievance pay list and questioned the union representatives as to whether or not to correct it. Pierce testified that, in his presence, Union Steward Lampley telephoned Union Group Steward Bob Ivey and discussed the situation. Lampley then told Pierce to "Pay it as we gave it to you." When Pierce responded that it was not right, Lampley stated, "Pay it as we give it to you. We skipped the man intentionally." Pierce later recounted this conversation to Lewis and Marvin. Lewis also repeated this conversation to Marvin on one occasion. The Administrative Law Judge also credited the testimony of employee Norman Petty that Union Steward Odom told Petty that he (Odom) knew the Union had a duty of equal representation of employees, but did not know if that went as far as grievance pay. Further, Union Steward Richard Lewis testified that Odom told him that he felt that, if a person was not in the Union, the person should not get grievance pay.

Each of the statements noted above was made by a representative of Respondent to a witness who testified at the hearing. Accordingly, they clearly constituted admissions attributable to Respondent. We further note that neither Lampley nor Odom took the witness stand to contradict the testimony of Pierce, Petty, and Lewis, who himself was a union steward.

² We will issue an Order in lieu of that recommended by the Administrative Law Judge to correspond more closely to the violations found.

(c) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post at its offices and meeting places copies of the attached notice marked "Appendix."³ Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and return to said Regional Director sufficient copies of the attached notice marked "Appendix" for posting by Goodyear Tire & Rubber Company, if willing, in conspicuous places, including all places where notices to members are customarily posted.

(c) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

³ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT prevent nonunion unit employees from receiving grievance pay.

WE WILL NOT inform employees that we have prevented nonunion unit employees from receiving grievance pay.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

**UNITED RUBBER, CORK, LINOLEUM
AND PLASTIC WORKERS OF AMERICA,
LOCAL 878**

DECISION

STATEMENT OF THE CASE

JOHN M. DYER, Administrative Law Judge: United Rubber, Cork, Linoleum and Plastic Workers of America, Local 878, herein called the Union, Local 878 or Respondent, was alleged to have violated Section 8(b)(1)(A) and (2) of the Act in a charge filed by Edward A. Marvin, an individual, on October 2, 1979.¹

On November 15, the Regional Director issued a complaint and notice of hearing alleging as violative of the Act, that, after a grievance in behalf of a group of employees, which included Marvin, had been filed and been sustained, the Union intentionally omitted Marvin's name from a grievance pay list which caused the Company not to pay Marvin the amount of money due him under the settlement of the grievance and that the Union, through two of its stewards, Lewis and Odom, stated that Marvin would not be paid because he was not a union member.

Respondent's timely answer admitted the jurisdictional and commerce allegations, its status as a union and the collective-bargaining representative of the employees in an appropriate unit at the Company, and that it had a current contract with the Company and that the relevant grievance had been filed on July 30 and been sustained on September 14. Respondent denied the other allegations of the complaint or that it had violated the Act in any manner; and affirmatively stated that, after discovering Marvin had not been included in the group of employees to be paid, it rectified such mistake and Marvin had been paid the full amount owed him.

Respondent also filed a motion to dismiss the complaint in this matter based on its statement of a "*de minimis* rule" and that everything necessary to make Marvin whole had been done.

Counsel for the General Counsel opposed the motion to dismiss on the basis that the nonpayment had been intentional because of Marvin's nonmembership in the Union and that the violation had not been cured by the payment of money to Marvin. This motion has been denied and renewed and is hereby denied again.

The question in this case is whether Respondent is responsible for the intentional omission of Marvin from payments due him under the grievance settlement because of his nonmembership in the Union and whether such act and the statements to that effect are violative of the Act to the extent that they need a remedy. In considering all the testimony, I find that such actions did violate the Act and that Respondent was responsible and that an appropriate remedy should be ordered.

All parties were afforded full opportunity to appear, to examine and cross-examine witnesses, and to argue orally at the hearing held in Union City, Tennessee, on April 10, 1980. Counsel for the General Counsel and Respondent gave short oral arguments, and Respondent filed a brief.

On the entire record in this case, including the exhibits and testimony, and on my evaluation of the reliability of the witnesses based on the evidence and the lack of denial of certain testimony, I make the following:

¹ Unless otherwise stated, all events herein occurred during 1979.

FINDINGS OF FACT

I. COMMERCE FINDINGS AND UNION STATUS

Goodyear Tire & Rubber Company is a corporation having offices and places of business in various States, including a facility in Union City, Tennessee, where it is engaged in the manufacture of radial tires. Annually, Goodyear purchased and received at its Union City facility, from points directly outside the State of Tennessee, goods and materials valued in excess of \$50,000, and during the same period sold and shipped from its Union City facility, directly to points outside the State of Tennessee, goods and materials valued in excess of \$50,000.

Respondent admits, and I find, that Goodyear is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Respondent admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. Background and Facts

Goodyear and Respondent have had a contractual relationship for a number of years and the current contract covers approximately 1,500 employees in what is basically a P and M unit. The affected group in this case is the instrument lab employees who are in the unit. Under the contract, if work is improperly assigned to a wrong group of employees, a grievance may be filed by the affected employees, and, where the grievance is settled in their behalf, pay for the work wrongly assigned is made to the affected employees. The contract provides a seniority system and, where such grievance pay is to be received, it is paid in order of seniority to a maximum of 4 hours per individual throughout the seniority roster for the affected group. If during the contract year each of the employees in that affected group has received 4 hours grievance pay, then the grievance pay would start again from the top of the seniority list. If a small amount of grievance pay was due, each person in seniority order would be paid up to 4 hours, counting all previous grievance pay during the year, and the balance given to the next employee through that or succeeding grievance pay payments until he was paid for 4 hours' grievance pay.

On July 30, an employee named Richard Lewis filed a grievance alleging that work which should have been performed by the employees of the instrument laboratory was improperly assigned to other employees. After filing the grievance, Lewis was elected a steward on the third shift in the instrument lab. Around September 14, the grievance was settled at the second step and provision was made for the payment of 6 hours' pay at regular rates to whoever was in line to receive it at that point.

On September 26, steward Lewis read out a list of those receiving grievance pay for that grievance and stated that employee Starks would receive pay for 1-1/2 hours, employee Maysse would receive pay for 4 hours, and employee Lewis would receive pay for one-half hour. After the announcement, employee Edward Marvin spoke to Lewis, saying the pay arrangement was improper since he had more seniority than employee

Maysse and should receive the pay listed to be paid to Maysse. Lewis agreed that the payment appeared to be improper according to the seniority status of the individuals and said he would check on it.

Jerry Lee Pierce, who became the maintenance supervisor in December 1979, was the salaried maintenance clerk prior to that time and was not in the unit. Pierce testified that he kept a book or log with a seniority list and in addition had a master seniority list. Sometime around July, in making payments in a different grievance, Pierce made up a list of employees to be paid and sent it to the payroll unit granting grievance pay to employee Marvin. The error was called to his attention and a proper distribution was made recalling the amount to Marvin. Pierce then asked the union steward to take the book to union headquarters and have it corrected so that he could make payments correctly. In September, he had not received the book back from the Union when payment of this grievance was to be made. On a Friday afternoon, steward Odom called Pierce and read off the names of the three employees to be paid, and the amounts. On the following Monday, Pierce said he checked the list given him by Odom against his master seniority list to make sure it was in the right order and found that Odom's list had skipped Marvin. He then called steward Lampley to the office and explained the problem to him, asking Lampley whether he should pay the persons named by Odom or correct it, suggesting it would be better to correct it right then. (Stewards Odom and Lampley had been in on the settlement of the grievance.) According to Pierce, Lampley telephoned group steward Bob Ivey. Pierce testified that he heard Lampley tell Ivey the problem. After a few minutes, Lampley hung up the phone and told Pierce "Pay it as we gave it to you." Pierce told Lampley that it was not right. Lampley said "Pay it as we give it to you." "We skipped the man intentionally."

Pierce typed up the list as given to him and turned it in to the accounting office for payment. According to Pierce, A week or 10 days later he was approached by union steward Lewis and employee Marvin and asked why Marvin had been skipped in the payment of the grievance pay. He told Lewis and Marvin that he did not do it intentionally, that if they had questions they should contact the Union and told them the conversation he had with Lampley, stating that he had followed the instructions.

Although the recollections of the individuals as to where this conversation took place and under what circumstances differs between the participants, the essentials of the conversation are the same in all their testimony in that all state that Pierce recited his conversation with Lampley and the statements as to why the money was paid as it was. Lewis repeated the conversation to Marvin at one point.

Marvin testified that on September 29 he requested and got a meeting with Third-Shift Superintendent Kimball and that steward Lewis was present with him. At the meeting he advised Kimball that he had talked to someone at the NLRB and they had told him he could not be skipped for grievance pay on the basis of not being in the Union and that both the Company and the

Union were liable to see that he was paid. Kimball said that he would take it up.

Marvin asked for an NLRB charge form which was mailed to him, completed and signed by him, and mailed back to the Regional Office where it was docketed on October 2.

On October 5, fellow employee Maysse told Marvin that the maintenance supervisor called him in and said an error had been made in paying the grievance pay and that the amount would be deducted from Maysse's pay and given to Marvin. On the following day, October 6, Supervisor Christian told Marvin that he would get the 4 hours' grievance pay in the near future.

Fellow employee Norman Petty testified that Marvin told him he had been passed over for grievance pay because he was not a union member. Petty stated that on October 3 he talked to first-shift steward Odom about it. Odom said he was aware of the situation and knew the Union had a duty of equal representation of employees, but did not know if that went as far as grievance pay. Odom told Petty that he was responsible for Marvin's not getting the grievance pay.

Steward Lewis testified that he discussed the problem of Marvin's being skipped with day-shift steward Odom. He testified that Odom said he felt that, if a person were not in the Union, that the person should not get grievance pay.

There is agreement that approximately a week after being told by the Company that he would get the grievance pay, Marvin received the appropriate amount.

B. Analysis and Conclusions

Respondent argues that since there is a specific section in the contract between the Union and the Company which provides a mechanism for employees to later be made whole for any amounts of pay skipped in making grievance payments, that this skipping of Marvin, since he was actually paid, leaves nothing to be done since the problem was corrected within a week or two of Marvin's being skipped. Respondent asserts that the small amount of money paid was *de minimis* and that this case should not have been processed because everything that needed to be done was done when Marvin received the grievance pay.

The General Counsel urges to the contrary that the problem has been only partially corrected by Marvin's receipt of the pay, since he asserts the procedure in the contract is to allow for skips in grievance pay that are made by mistakes, but not by intentional direction, and the practice became known, at the least, to the instrument lab employees, and was not rescinded by the Union. Respondent put on no evidence to rebut the testimony given by Marvin, Lewis, Petty, and Pierce, and it therefore stands uncontradicted that the skipping of Marvin for grievance pay because he was not a union member was done on the basis of directions to Pierce by shop stewards Odom, Lampley, and Ivey. The uncontradicted testimony that Odom felt it was unnecessary in representing unit employees that grievance pay be made to a nonunion employee is the basis for skipping Mar-

vin's pay. That is confirmed by Lampley's statement to Pierce that the skipping was done intentionally.

Under the Act, the Union owes a duty to all employees in a unit it represents, to represent them fairly and honestly and not to arbitrarily discriminate against anyone in that unit because of nonmembership in the Union. The fact of the discrimination and the Union's responsibility for it is clear on this record and certainly was known to the employees in the instrument lab, merely by the fact of the announcement of the manner in which the pay was to be made. In an organization of some 20 employees, such as the instrument lab, the employees know one another's seniority and their relative standing in it. It was clear in this instance that skipping Marvin was done for a particular purpose, in essence, to punish him for not being a union member. The fact that Marvin was paid eventually does not wipe out the damage done to employees in that instrument lab and wherever else it may have become known that the Union sought to punish an employee for not being a union member, by not dealing fairly with him in the apportionment of the grievance pay.

I find that the statements made by Odom to Lewis and to Petty violated Section 8(b)(1)(A) of the Act. I further find that the statements made by Lewis to Marvin, reiterating what he had been told as to the position of the Union, and the fact that Marvin was skipped in the payment of grievance pay violated Section 8(b)(1)(A) and (2) of the Act, and that partial remedy of the violation of Section 8(b)(2) has been made by the receipt of the money by Marvin, but that the violation has not been completely remedied as stated above. At the present there is no regression by the Union from the position taken by Odom, Lampley, and Ivey, and there is no assurance that this violation might not be repeated. Therefore I will order that an appropriate notice be posted by the Union to all of its members and, if the Company is willing, posted at the Company where employees of the instrument lab would normally read company notices.

III. EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Union set forth in section II, above, occurring in connection with the operations of the Company, described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IV. THE REMEDY

Having found that Respondent engaged in unfair labor practices, I recommend and order that it cease and desist therefrom and that it take certain affirmative action specified below, which is necessary to remedy and remove the effects of the unfair labor practices and to effectuate the policies of the Act. I recommend that Respondent not only post a notice to members, attached as an appendix hereto, but that it provide additional copies of the same for posting by the Company if it is willing.

CONCLUSIONS OF LAW

1. United Rubber, Cork, Linoleum and Plastic Workers of America, Local 878, is a labor organization within the meaning of Section 2(5) of the Act.
2. Goodyear Tire & Rubber Company is an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
3. By initially preventing Edward A. Marvin from receiving grievance pay because he was not a union member, Respondent breached its duty of fair representation of unit employees and violated Section 8(b)(1)(A) and (2) of the Act.
4. By informing unit employees and union members that it had initially prevented Edward A. Marvin, a unit employee, from receiving grievance pay because he was not a union member, Respondent violated Section 8(b)(1)(A) of the Act.

[Recommended Order omitted from publication.]